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IN THE

Supreme Court of the United States

No. 75-1840

HAL HAVILAND,

Petitioner,

v.

EARL L. BUTZ, SECRETARY OF AGRICULTURE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Petitioner, Hal Haviland, respectfully prays that a writ of certiorari be allowed by this Court for review of the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit.

OPINION BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit for which review is sought is captioned Hal Haviland, Appellant, v. Earl L. Butz, Secretary of Agriculture, No. 74-1322, argued February 25,

1975, decided March 23, 1976, and printed as an appendix to this petition at page 1a.

JURISDICTION

This Court's jurisdiction is invoked pursuant to 28 U.S.C. 1254.

QUESTIONS PRESENTED FOR REVIEW

1. Whether extension of the Animal Welfare Act to "animal acts" by means of a rule promulgated by the Secretary of Agriculture is a legislative enactment in contravention of Article I, § 1, of the U.S. Constitution?

2. Whether multi-state performances of a dog and pony show are activities sufficiently affecting interstate commerce to come within the legislative authority conferred by the Commerce Clause, U.S. Constitution, Article I, § 8, Clause 3?

3. Whether the definition of "exhibitor" as applied by the Secretary of Agriculture and Congress under the Animal Welfare Act infringes the equal protection guarantee of the Fifth Amendment due process clause?

STATUTORY PROVISIONS INVOLVED

7 U.S. Code 2132(h), Public Law 89-544, § 2, August 24, 1966, 80 Stat. 350; Public Law 91-579, § 3, December 24, 1970, 84 Stat. 1560:

> "(h) The term 'exhibitor' means any person (public or private) exhibiting any animals, which were purchased in commerce or the intended distribution of which affects commerce, or will affect

> commerce, to the public for compensation, as determined by the Secretary, and such term includes carnivals, circuses, and zoos exhibiting such animals whether operated for profit or not; but such term excludes retail pet stores, organizations sponsoring and all persons participating in State and country fairs, livestock shows, rodeos, pure bred dog and cat shows, and any other fairs or exhibitions intended to advance agricultural arts and sciences, as may be determined by the Secretary."

REGULATORY PROVISIONS INVOLVED

9 C.F.R. 1.1(v):

> "(v) 'Exhibitor' means any person (public or private) exhibiting any animals, which were purchased in commerce or the intended distribution of which affects commerce, or will affect commerce, to the public for compensation, as determined by the Secretary in specific instances, and such term includes carnivals, circuses, animal acts, and zoos exhibiting such animals whether operated for profit or not; but such term excludes retail pet stores, organizations sponsoring and all persons participating in State and county fairs, livestock shows, rodeos, pure bred dog and cat shows, and any other fairs or exhibitions intended to advance agricultural arts and sciences, as may be determined by the Secretary in specific instances."

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Constitution Article I, § 1:

"All Legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and a House of Representatives."

U.S. Constitution Article I, § 8, Clause 3:

"The Congress shall have power . . . to regulate Commerce with Foreign Nations, and among the several States, and with the Indian Tribes;"

U.S. Constitution, Amendment V:

"No person shall . . . be deprived of life, liberty, or property, without due process of law;"

STATEMENT OF THE CASE

Petitioner Haviland owns and operates a professional animal act in which dogs and ponies are featured, which performs in various states in connection with county fairs and other types of performances. The Secretary of Agriculture gave him notice that he was in alleged violation of the licensing provisions of the Animal Welfare Act of 1970 and that proceedings might be instituted to compel compliance. To avoid the risk of penalties, Haviland obtained an exhibitor's license. He then brought suit in the court below asking for a declaratory judgment that he was not subject to regulation under the Act. The court below granted judgment in favor of the Secretary of Agriculture and petitioner Haviland has taken this appeal.

REASONS RELIED UPON FOR ALLOWANCE OF THE WRIT

Petitioner Haviland submits that there are special and important reasons within the meaning of Rule 19 of this Court for permitting a review on writ of certiorari in that the court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court.

Congress in the exercise of its legislative responsibilities and authority under Article I of the U.S. Constitution, after pursuing the customary and usual legislative process involving hearings in which the Secretary of Agriculture's representatives participated, defined the term "exhibitors" in the Animal Welfare Act of 1970 (7 U.S.C. 2132(h)) as meaning "any person (public or private) exhibiting animals, which were purchased in commerce or the intended distribution of which affects commerce, or will affect commerce, to the public for compensation, as determined by the Secretary, and such term includes carnivals, circuses, and zoos exhibiting such animals whether operated for a profit or not; but such term excludes retail pet stores, organizations sponsoring, and all persons participating in State and county fairs, livestock shows, rodeos, pure bred dog and cat shows, and any other fairs or exhibitions intended to advance agricultural arts and sciences, as may be determined by the Secretary." Not content with the reach of the above quoted statutory definition as enacted by Congress, the Secretary of Agriculture in effect re-legislated the definition of "exhibitor" quoted above to add to the term "animal acts" (36 Fed. Reg. 24917, 9 C.F.R. 1.1(v)) as follows:

"'Exhibitor' . . . includes carnivals, circuses *animal acts*, and zoos . . ." (Emphasis added).

This Court has said that ". . . the Constitution is neither silent nor equivocal about who shall make the laws . . .", and that "the Founders of this Nation entrusted the law making powers to the Congress alone in both good and bad times". *Youngstown Sheet and Tube Company v. Sawyer*, 343 U.S. 579, 589. And this Court has recently reminded us in *Ernst and Ernst v. Hochfelder*, ___ U.S. ___, 47 L.Ed.2d 668, 96 S.Ct. 1375 (1976) that, "The rule making power granted to an administrative agency charged with the administration of a federal statute is not the power to make law. Rather, it is 'the power to adopt regulations to carry into effect the will of Congress as expressed by the statute.'" If the Congress had wanted the Act to cover "animal acts", it would have said so and had ample opportunity to do at the time the Animal Welfare Act was being considered. Congress not having said so, the Secretary of Agriculture is without legislative power to change the Act by having a new class of persons covered, i.e., "animal acts", by promulgating a rule which duplicates the language of the statute with the exception that it inserts the term "animal acts" between "circuses" and "zoos", terms of art used by Congress. If the Department of Agriculture thought "animal acts" should have been included in the Act, they could have presented the matter to Congress for its consideration at the time they were testifying on the bill. They did not do so, and may not now amend the Act by adding a new class of persons to be covered by the Act and who as a result are required to obtain federal licenses in order to carry on their businesses.

Petitioner also urges that the above cited provision, as applied by the Secretary of Agriculture in this case, is beyond the legislative authority conferred on the Congress by the Commerce Clause. In the Animal Welfare Act (7 U.S.C. 2132(h)), Congress was careful to define the term "exhibitor" as only meaning persons exhibiting animals which were purchased in commerce or the intended distribution of which affects commerce, or will affect commerce. It seems quite clear that the language selected by Congress was intended to require federal inspections and licenses for the non-local activity of distributing animals in interstate commerce, with the emphasis being upon "distribution" and not upon the local performance of dog and pony shows. This seems clear by the terms of the above cited section of the Animal Welfare Act of 1970 itself, which says that the term "exhibitor" includes "carnivals, circuses, and zoos *exhibiting* such animals." (Emphasis supplied) These activities involve large numbers of caged animals "which were purchased in commerce" or involve "intended distribution" of animals on a large scale. The court below recognizes that there was no showing that petition Haviland exhibited his dogs and ponies as caged animals or purchased his dogs and ponies "in commerce" or that they were involved in any "intended distribution". It would appear that a dog and pony show of the kind owned and operated by petitioner Haviland falls more nearly in the exclusion from the term "exhibitor" that Congress included in the above section of the Animal Welfare Act. It provides in pertinent part that the "term excludes retail pet stores, organizations sponsoring and all persons participating in State and country fairs, livestock shows, rodeos, pure bred dog and cat shows, and any other fairs or exhibitions intended to advance agricultural arts

and sciences . . ." It appears quite clear that Congress intended to draw a line between the types of caged animals which were involved in a "distribution" and to exclude animals which were in pet stores, fairs, and the other types of local performances or exhibitions enumerated in the statute. Caged animals in circuses and zoos are sometimes neglected – they are "exhibited" like chattels. Petitioner Haviland's dogs and ponies are his livelihood. His animals are not "exhibited", they perform in a theatrical type production. E.g., *Metropolitan Opera v. Hammerstein*, 147 N.Y.S. 535; *In Re Oriental Society*, 104 F. 975.

To include petitioner Haviland within reach of the Act and to include "animal acts" involving local performances in those types of exhibitions related to distributions instead of leaving animal acts among the excluded classes as Congress apparently intended, is an arbitrary and capricious application of the statute and, as applied, carries the statute outside the legislative authority of the Commerce Clause.

Finally, petitioner Haviland urges that Congress itself has perpetrated an unconstitutionally invidious classification by defining "exhibitor" to include carnivals, circuses, and zoos, but to exclude retail pet stores, organizations sponsoring and all persons participating in State and country fairs, livestock shows, rodeos, pure bred dog and cat shows, and any other fairs or exhibitions intended to advance agricultural arts and sciences, as may be determined by the Secretary. The Animal Welfare Act originally was enacted in 1966 (Public Law No. 89-544, 80 Stat. 350) "to deal with the abuses that have developed as a result of the nation's vast program of medical research", and was aimed at research involving experimentation with animals, the theft of animals and the trafficking in stolen animals. Following the almost predictable pattern of bureaucracy as it slowly engulfs the nation in red tape, Congress was

induced in 1970 to expand the coverage of the 1966 statute to enlarge the class of protected animals to include pets and animals used for exhibition purposes, as well as those used for research purposes. The legislative history of the 1970 Act does not suggest that it was the intention of Congress to attempt to extend its authority under the Commerce Clause to cover purely local dog and pony show performances of the kind put on by petitioner Haviland. (See H.R. Rep. No. 1651, 91st Cong., 2d Sess. 9 (1970)). The Secretary of Agriculture, by using his rule making power to extend the Act to Haviland's dog and pony show, applies the Act in such a way as to exceed congressional power under the Commerce Clause and discriminates invidiously against Haviland in contravention of the Fifth Amendment's due process clause. Just as this Court has prevented Congress from delegating its legislative power (*Panama Refining Co. v. Ryan*, 293 U.S. 388; *Schechter Corp. v. United States*, 295 U.S. 495), it should also stop the Secretary from enlarging the class of persons covered by the Act by using his rule making power for a legislative purpose, or to usurp the legislative authority the Congress does have.

> ". . . every remote, possible, speculative effect on commerce should not be accepted as an adequate constitutional ground to uproot and throw into the discard all our traditional distinctions between what is purely local . . . and what . . . is . . . subject to control by federal laws." *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964).

For the above reasons, petitioner Haviland believes this Court should exercise its sound judicial discretion to review the judgment of the court below on writ of certiorari in order to decide the important questions of federal law

arising under the Animal Welfare Act of 1970 which have not been, but should be, settled by this Court.

Respectfully submitted,

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 74-1322

HAL HAVILAND, APPELLANT

v.

EARL L. BUTZ, SECRETARY OF AGRICULTURE

Appeal from the United States District Court
for the District of Columbia
(D.C. Civil Action No. 474-73)

Argued February 25, 1975

Decided March 23, 1976

Carl L. Shipley for appellant.

Justin D. Simon, Assistant United States Attorney, with whom *Earl J. Silbert*, United States Attorney, *John A. Terry* and *George G. Corcoran, Jr.*, Assistant United States Attorneys, were on the brief, for appellee.

Before: LEVENTHAL and ROBINSON, *Circuit Judges*, and JACK R. MILLER,* *Judge*, United States Court of Customs and Patent Appeals

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* Sitting by designation pursuant to 28 U.S.C. § 293(a) (1970).

ROBINSON, *Circuit Judge*: Hal Haviland owns and operates a professional animal act in which dogs and ponies are featured.[1] The act is presented to paying audiences in a number of states[2] and has occasionally appeared on commercial television.[3] In the view that Haviland was an "exhibitor" as defined by the Animal Welfare Act of 1970,[4] the Department of Agriculture gave notice that he was in violation of its licensing provisions[5] and that proceedings might be instituted to compel compliance.[6]

To avoid the risk of possible penalties,[7] Haviland obtained an exhibitor's license.[8] He then brought suit in the District Court against the Secretary of Agriculture

[1] While the record is silent as to the exact number of animals thus engaged, Haviland tells us that "[h]e uses one or two ponies and four or five dogs." Brief for Appellant at 5.

[2] Between August 1, 1972, and August 16, 1973, Haviland gave performances in 13 states on approximately 73 separate dates.

[3] During the period mentioned, note 2 *supra*, the act performed on commercial television in Chicago and the District of Columbia on three separate occasions.

[4] Pub.L.No. 91-579, 84 Stat. 1560 (1970), 7 U.S.C. §§ 2131 *et seq.* (1970). See also text *infra* at note 18.

[5] Animal Welfare Act of 1970, § 7, 7 U.S.C. § 2136 (1970). See also text *infra* at note 17.

[6] See Animal Welfare Act of 1970, § 17(c), 7 U.S.C. § 2146 (c) (1970). See also note 8 *infra*.

[7] See Animal Welfare Act of 1970, §§ 20(a), (c), 7 U.S.C. §§ 2149(a), (c) (1970).

[8] The Secretary of Agriculture apparently has not, however, seen fit to establish any procedure by which Haviland could have contested administratively the applicability of the Act to his operation. Although the regulations delineate procedures for adjudication of charges of violations by licensees, see 9 C.F.R. §§ 4.1 *et seq.* (1975), those procedures do not apply to failures to obtain licenses. See 9 C.F.R. § 4.3 (1975).

for a judgment declaring that he was not subject to regulation under the Act.[9] The court granted summary

[9] We think the District Court had power to deal with Haviland's lawsuit. Section 17(c) of the Act, 7 U.S.C. § 2146(c) (1970), confers jurisdiction on the federal district courts "in all . . . kinds of cases arising under" the Act except as provided in §§ 17(b) and 21(b), 7 U.S.C. §§ 2146(b), 2150(b) (1970). Section 17(b) channels review of final cease and desist orders to the courts of appeals, and specifically provides that "[j]udicial review of any such order shall be upon the record upon which the final determination and order of the secretary were based." Haviland was not seeking review of any cease and desist order, for there had been none, nor was there any administrative record upon which the Department's notice could have been based. See note 8 *supra*. Section 21(b), providing also for review in the courts of appeals, applies only to the Secretary's final orders affecting research facilities. It is thus clear that neither of the two exceptions from district court jurisdiction has any role in the case at bar. And plainly the dispute regarding licensing was one "arising under" the Act. *Oneida Indian Nation* v. *Oneida County*, 414 U.S. 661, 676-682, 94 S.Ct. 772, 781-784, 39 L.Ed.2d 73, 84-87 (1974); *Montana-Dakota Utils. Co.* v. *Northwestern Pub. Serv. Co.*, 341 U.S. 246, 249, 71 S.Ct. 692, 694, 95 L.Ed. 912, 917-918 (1951); *Binderup* v. *Pathe Exchange*, 263 U.S. 291, 305-312, 44 S.Ct. 96, 98-101, 68 L.Ed. 308, 314-318 (1923); *Hopkins* v. *Walker*, 244 U.S. 486, 489-491, 37 S.Ct. 711, 712-714, 61 L.Ed. 1270, 1274-1275 (1917); *Pacific Elec. R.R.* v. *Los Angeles*, 194 U.S. 112, 117-118, 24 S.Ct. 586, 588-589, 48 L.Ed. 896, 899 (1904); *Walla Walla* v. *Walla Walla Water Co.*, 172 U.S. 1, 11, 19 S.Ct. 77, 81-82, 43 L.Ed. 341, 346 (1898).

Although there has been no "formal" agency action, see note 8 *supra*, we see no difficulty in subjecting the Secretary's activity to judicial review at this point. See *Independent Broker-Dealers' Trade Ass'n* v. *SEC*, 142 U.S.App.D.C. 384, 391-393, 442 F.2d 132, 139-141, *cert. denied*, 404 U.S. 828, 92 S.Ct. 63, 30 L.Ed.2d 57 (1971); *Medical Comm. for Human Rights* v. *SEC*, 139 U.S.App.D.C. 226, 235-240, 432 F.2d 659, 668-673 (1970), *vacated on other grounds*, 404 U.S. 403, 92 S.Ct. 577, 30 L.Ed.2d 560 (1972). And notwithstanding claims by Haviland that the Act is unconstitutional, a three-judge court was not required since his complaint did not request injunctive re-

judgment in favor of the Secretary [10] and Haviland now appeals.

Reversal is urged on several grounds. Haviland asserts that the Act, properly construed, does not extend to his dog and pony show, and that inclusion of animal acts in the Secretary's implementing regulations is an unconstitutional usurpation of legislative power.[11] He further contends that the Act exceeds congressional power under the Commerce Clause [12] and discriminates invidiously in contravention of the Fifth Amendment's Due Process Clause.[13] We affirm.

I

In 1966, Congress enacted the Federal Laboratory Animal Welfare Act [14] "to deal with the abuses that have developed as a result of the Nation's vast program of medical research," [15] particularly research involving experimentation with animals.[16] The Animal Welfare Act of 1970 expanded the coverage of the 1966 statute to enlarge the class of protected animals and to regulate

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lief, but only a declaratory judgment. *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144, 153-155, 83 S.Ct. 554, 559-561, 9 L.Ed. 2d 644, 652-653 (1963); *Sellers* v. *Regents of Univ. of California*, 432 F.2d 493, 498 (9th Cir. 1970), *cert. denied*, 401 U.S. 981, 91 S.Ct. 1194, 28 L.Ed.2d 333 (1971).

[10] *Haviland* v. *Butz*, Civ. No. 474-73 (Dec. 13, 1973) (unreported).

[11] Discussed in Part I *infra*.

[12] Discussed in Part II *infra*.

[13] Discussed in Part II *infra*.

[14] Pub.L. No. 89-544, 80 Stat. 350 (1966).

[15] S.Rep. No. 1281, 89th Cong., 2d Sess. 5 (1966).

[16] *Id.*

their use for exhibition purposes or as pets as well as their use for research purposes.[17]

The Secretary claims that Haviland is subject to the Animal Welfare Act as an "exhibitor," defined by the Act as

> any person (public or private) exhibiting any animals, which were purchased in commerce or the intended distribution of which affects commerce, or will affect commerce, to the public for compensation, as determined by the Secretary, and such term includes carnivals, circuses and zoos exhibiting such animals whether operated for profit or not; but such term excludes retail pet stores, organizations sponsoring and all persons participating in State and country [*sic*] fairs, livestock shows, rodeos, purebred dog and cat shows, and any other fairs or exhibitions intended to advance agricultural arts and sciences, as may be determined by the Secretary.[18]

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[17] See H.R. Rep. No. 1651, 91st Cong., 2d Sess. 9 (1970). The occasion for the legislation is described as follows:

> In order to protect the owners of animals, from the theft of their animals, to prevent the sale or use of animals which have been stolen, and to insure that certain animals intended for use in research facilities or for exhibition purposes or for use as pets are provided humane care and treatment, it is essential to regulate the transportation, purchase, sale, housing, care, handling, and treatment of such animals by persons or organizations engaged in using them for research or experimental purposes or for exhibition purposes or holding them for sale as pets or in transporting, buying, or selling them for any such purpose or use.

Animal Welfare Act of 1970, § 2, 7 U.S.C. § 2131 (1970). The Act establishes humane standards, §§ 13, 14, 15, 7 U.S.C. §§ 2142, 2143, 2144 (1970), and requirements for licenses, registration and recordkeeping, §§ 4, 5, 7, 11, 13, 7 U.S.C. §§ 2133, 2134, 2136, 2140, 2142 (1970), and provides for inspections, §§ 17(a), 18, 7 U.S.C. §§ 2146(a), 2147 (1970).

[18] Animal Welfare Act of 1970, § 3(h), 7 U.S.C. § 2132(h) (1970).

The Secretary's regulations augment the statutory definition by inserting the words "animal acts" between "circuses" and "zoos." [19]

Haviland contends that this addition is unauthorized —that the Act, as written and intended, does not embrace animal performances—and that the Secretary could not expand its coverage.[20] We think, however, that exhibitions utilizing animals to which the Act extends its protections [21] were fairly comprehended among its objects.[22] The Act itself declares that one of its goals is

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[19] 9 C.F.R. § 1.1(v) (1975). The Secretary also corrected a rather obvious printing error, changing "country" to "county." *Id.*

[20] The argument is cast in constitutional form—that Congress did not cover animal acts in the Animal Welfare Act of 1970, and the Secretary cannot do so because only Congress is constitutionally authorized to exercise the federal legislative power. U.S. Const. art. 1, § 1; see also *Youngstown Sheet and Tube Co.* v. *Sawyer*, 343 U.S. 579, 587-589, 72 S.Ct. 863, 866-867, 96 L.Ed. 1153, 1167-1168 (1952). Since it cannot be maintained that the Secretary may enact legislation, the question becomes simply whether the Secretary had authority to specifically designate animal acts as activities embraced within the legislation.

[21] See note 23 *infra*.

[22] We are mindful that one otherwise an "exhibitor" is not subject to the Act unless his exhibition includes an animal "purchased in commerce or the intended distribution of which affects, or will affect commerce." Animal Welfare Act of 1970, § 3(h), 7 U.S.C. § 2132(h) (1970). While it appears that in 1971 Haviland bought two dogs in Michigan and in 1973 was given two dogs in Ohio, we would agree that this information is too skimpy to eliminate a dispute, generated by the pleadings, as to whether Haviland exhibits a protected animal "purchased in commerce." Particularly in view of Haviland's extensive travels, acquisition of these animals may have occurred under circumstances such that they were not

"purchased in commerce" within the contemplation of the Act.

We are, however, satisfied that Haviland's animal show is intercepted because it features dogs "the intended distribution of which affects commerce." Despite some ambiguity arising from selection of the word "distribution," other factors persuade us to the conclusion that its intended import is synonomous with "transportation." In the first place, a commonly accepted meaning of "distribution" is "a spreading out or scattering over an area or throughout a space." *Merriam-Webster New International Dictionary* 660 (3d ed. 1964). Thus "distribution" is somewhat broader than "transportation" in the sense that the movement effecting the spreading out need not be recurrent. More importantly, the Act expressly declares at the outset that "[i]n order . . . to insure that [protected] animals intended for use . . . for exhibition purposes . . . are provided humane care and treatment, it is essential to regulate the *transportation* . . . of such animals by persons and organizations engaged in using them for . . . exhibition purposes or . . . in *transporting* . . . them for any such purpose or use." Animal Welfare Act of 1970, § 2, 7 U.S.C. § 2131 (1970), quoted in full *supra* note 17 (emphasis supplied). Indeed, it would strike us as highly anamolous that an animal-act producer would be regulated if he bought but one animal in interstate commerce, but otherwise would not be regulated although his entire animal troupe was continually on an interstate circuit. We similarly have difficulty in believing that Congress meant to condition amenability to the Act as an "exhibitor" simply on an intention to eventually dispose of an animal in interstate commerce, perhaps years later after its days as a performer came to an end. We cannot imagine what sort of interstate "distribution" Congress envisioned in the case of an animal exhibitor unless it is the distribution inherent in widespread state-to-state renditions.

Without a doubt, Haviland's activities as such an exhibitor fully meet the "distribution" test as thus interpreted. His dog and pony show travels constantly through a number of states. See notes 2-3 *supra*. Transportation of his complement of animal actors for their far flung schedule of appearances "affects commerce." That term "means in commerce, . . ." *id.* § 3(d), 7 U.S.C. § 2131(d) (1970), and the commerce spoken of is interstate commerce. *Id.* § 3(c), 7 U.S.C. § 2131(c) (1970).

"to insure that certain animals intended for use . . . for exhibition purposes . . . are provided humane care and treatment. . . ." [23] The statutory specification is that "[t]he term 'exhibitor' . . . *includes* carnivals, circuses and zoos exhibiting such animals," [24] and not that other essentially similar enterprises are excluded. In like vein, the accompanying report of the House Committee on Agriculture [25] states that a prime objective was to "bring into the regulatory framework of the Act for the first time exhibitors (*such as* circuses, zoos, carnivals and road shows). . . ." [26] The words "includes" and "such as" point convincingly to the conclusion that the listing of types of exhibitions in the statutory text was intended to be but partial and illustrative.

Moreover, courts are duty bound to follow "the construction of a statute by those charged with its execution . . . unless there are compelling indications that it is wrong." [27] This "deference . . . is heightened when,"

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[23] Animal Welfare Act of 1970, § 2, 7 U.S.C. § 2131 (1970), quoted *supra* note 17. The Act defines "animals," in relevant part, as including "any live . . . dog . . . , or such other warm-blooded animal, as the Secretary may determine is being used, . . . for . . . exhibition purposes. . . ." Animal Welfare Act of 1970, § 3(g), 7 U.S.C. § 2132(g) (1970). Since Haviland employs dogs in his act, we need not consider whether the ponies used therein fall within § 3(g)'s exception for "horses not used for research purposes."

[24] Animal Welfare Act of 1970, § 3(h), 7 U.S.C. § 2132(h) (1970) (emphasis supplied).

[25] No Senate Report accompanied the legislation.

[26] H.R. Rep. No. 1651, 91st Cong., 2d Sess. 2 (1970) (emphasis supplied).

[27] *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 381, 89 S.Ct. 1794, 1801-1802, 23 L.Ed.2d 371, 383-384 (1969). See also *Udall* v. *Tallman*, 380 U.S. 1, 16-18, 85 S.Ct. 792, 801-802, 13 L.Ed.2d 616, 625-627 (1965); *United Shoe Workers* v. *Bedell*, 165 U.S.App.D.C. 113, 124, 506 F.2d 174, 185 (1974).

as here, "the case involves the construction of a new statute by its implementing agency." [28] We see nothing suggesting persuasively that the Secretary's interpretation of "exhibitor" is incorrect. Certainly we discern no difference between animal acts on the one hand and circuses and carnivals on the other that is significant enough to warrant an upset of the Secretary's construction as a departure from the intent of Congress.[29]

We are thus constrained to reject Haviland's contention that the statutory listing of covered enterprises is exhaustive, and to sustain the Secretary's interpretative regulation. The Secretary is empowered "to promulgate such rules, regulations, and orders as he may deem necessary in order to effect the purposes of" the statutory scheme.[30] It has long been recognized that delegations of this kind are necessary to enable Congress to exert its legislative powers effectively.[31] We find nothing in

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[28] *Natural Resources Defense Council, Inc.* v. *Train*, 166 U.S.App.D.C. 312, 326, 510 F.2d 692, 706 (1975). See also *Power Reactor Dev. Corp.* v. *Electrical Workers Int'l*, 367 U.S. 396, 408, 81 S.Ct. 1529, 1535, 6 L.Ed.2d 924, 932 (1961).

[29] Haviland argues that since the Secretary thought it necessary to add "animal acts" to the definition of "exhibitor," he did not regard "animal acts" as synonomous with any of the descriptive words appearing in the statute. We cannot accept the premise of this argument. It seems far more likely that the Secretary was endeavoring to give notice that animal acts would be deemed within the statutory definition, thereby, to the extent possible, keeping operators of animal acts from being taken by surprise.

[30] Animal Welfare Act of 1970, § 21, 7 U.S.C. § 2151 (1970).

[31] *Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U.S. 381, 398, 60 S.Ct. 907, 914, 84 L.Ed. 1263, 1273-1274 (1940); *Currin* v. *Wallace*, 306 U.S. 1, 15, 59 S.Ct. 379, 386-387, 83 L.Ed. 441, 451 (1939); *Panama Ref. Co.* v. *Ryan*, 293 U.S. 388, 421, 55 S.Ct. 241, 248-249, 79 L.Ed. 446, 459 (1935).

this delegation to justify the extraordinary step of declaring it void.[32] We hold that Haviland is within the regulatory compass of the Act.

II

We now address Haviland's constitutional contentions, first his argument that multistate presentations of his dog and pony show are not activity affecting interstate commerce, and for that reason are beyond the legislative authority conferred by the Commerce Clause.[33] Characterizing his animal performances as local exhibitions analogous to baseball games, Haviland relies primarily on three Supreme Court decisions[34] for the proposition that his productions, like professional baseball contests, are not appropriate subjects for federal regulation. This position does not withstand analysis of the precedents cited, nor does Haviland's claim of immunity for his own operation survive the impact of relevant decisions during the past generation.[35]

In 1922, the Supreme Court held in *Federal Baseball Club* v. *National League*[36] that the business of staging baseball games, though in a multistate circuit, is not interstate commerce.[37] This view was adhered to in 1953

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[32] Compare cases cited *supra* note 31.

[33] U.S. Const. art. 1, § 8, cl. 3.

[34] *Flood* v. *Kuhn*, 407 U.S. 258, 92 S.Ct. 2099, 32 L.Ed.2d 728 (1972); *Toolson* v. *New York Yankees, Inc.*, 346 U.S. 356, 74 S.Ct. 78, 98 L.Ed. 64 (1953); *Federal Baseball Club* v. *National League*, 259 U.S. 200, 42 S.Ct. 465, 66 L.Ed. 898 (1922).

[35] See cases cited *infra* notes 45, 47.

[36] *Supra* note 34.

[37] 259 U.S. at 209, 42 S.Ct. at 466, 66 L.Ed. at 900.

in *Toolson* v. *New York Yankees, Inc.*,[38] "[w]ithout reexamination of the underlying issues."[39] In *Flood* v. *Kuhn*,[40] decided in 1972, however, the Court denominated the rule of *Federal Baseball* and *Toolson* "an aberration confined to baseball."[41] Despite the local quality of individual contests, professional baseball, the Court said, was indeed an interstate enterprise;[42] only on grounds of stare decisis was there justification for the gross inconsistency of *Federal Baseball* and *Toolson* with orthodox doctrine defining the commerce power.[43] Even more significantly, the Court stated specifically that virtually all other professional sports are to be treated as operations in interstate commerce and amenable to federal legislation.[44]

Our mandate is thus clear—the principle enunciated in *Federal Baseball* and *Toolson* is not to be extended to other businesses. Moreover, that is the clear course of judicial decision.[45] We hold that Haviland's animal act, traveling from state to state to render performances and sometimes even utilizing the facilities of interstate com-

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[38] *Supra* note 34.

[39] 346 U.S. at 357, 74 S.Ct. at 79, 98 L.Ed. at 68.

[40] *Supra* note 34.

[41] 407 U.S. at 282, 92 S.Ct. at 2112, 32 L.Ed.2d at 743.

[42] *Id.*

[43] *Id.* at 282-283, 92 S.Ct. at 2112, 32 L.Ed.2d at 744.

[44] *Id.*

[45] *Radovich* v. *National Football League*, 352 U.S. 445, 450-452, 77 S.Ct. 390, 393-394, 1 L.Ed.2d 456, 460-462 (1957); *United States* v. *International Boxing Club*, 348 U.S. 236, 243, 75 S.Ct. 259, 262, 99 L.Ed. 290, 296 (1955); *United States* v. *Shubert*, 348 U.S. 222, 228-230, 75 S.Ct. 277, 281-282, 99 L.Ed. 279, 285-287 (1955). See also *Haywood* v. *National Basketball Ass'n*, 401 U.S. 1204, 91 S.Ct. 672, 28 L.Ed.2d 206 (1971) (Douglas, J., as Circuit Justice).

munication to reach its audiences,[46] is subject to regulation by Congress in the exercise of the commerce power.[47]

Lastly, Haviland argues that the classification effected by the Act's definition of "exhibitor" [48] infringes the equal protection guaranty of the Fifth Amendment's Due Process Clause.[49] The term is to include "carnivals, circuses, and zoos"—and, as we have held, animal acts—but is to exclude "retail pet stores, organizations sponsoring and all persons participating in State and county fairs, livestock shows, rodeos, purebred dog and cat shows, and any other fairs or exhibitions intended to advance agricultural arts and sciences, as may be determined by the Secretary." [50] But notwithstanding the number and breadth of the exclusions, the "legislative classification must be sustained if the classification itself is rationally related to a legitimate governmental interest." [51] We believe that clearly it is.

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[46] See notes 2-3 *supra*.

[47] Compare *Katzenbach* v. *McClung*, 379 U.S. 294, 85 S.Ct. 377, 13 L.Ed.2d 290 (1964); *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U.S. 241, 85 S.Ct. 348, 13 L.Ed.2d 258 (1964); *Wickard* v. *Filburn*, 317 U.S. 111, 63 S.Ct. 82, 87 L.Ed. 122 (1942); *Gibbons* v. *Ogden*, 22 U.S. (9 Wheat.) 1, 194-195 (1822).

[48] See text *supra* at note 18.

[49] The "approach to Fifth Amendment equal protection claims has always been precisely the same as to equal protection claims under the Fourteenth Amendment." *Weinberger* v. *Weisenfeld*, 420 U.S. 636, 638 n.2, 95 S.Ct. 1225, 1228 n.2, 43 L.Ed.2d 514, 519 n.2 (1975). See also *United States Dep't of Agriculture* v. *Moreno*, 413 U.S. 528, 533, 93 S.Ct. 2821, 2825, 37 L.Ed.2d 782, 787 (1973); *Schneider* v. *Rusk*, 377 U.S. 163, 168, 84 S.Ct. 1187, 1190, 12 L.Ed.2d 218, 222 (1964); *Bolling* v. *Sharpe*, 347 U.S. 497, 74 S.Ct. 693, 98 L.Ed. 884 (1954).

[50] See text *supra* at note 18.

[51] *United States Dep't of Agriculture* v. *Moreno*, *supra* note 49, 413 U.S. at 533, 93 S.Ct. at 2825, 37 L.Ed.2d at 787. See

Among the expressly articulated purposes of the Act, we repeat, is assurance that designated species of animals used in the types of exhibitions covered will receive humane care and treatment.[52] The coverage clause of the definition of "exhibitor" directly implements this legislative objective. Haviland wisely does not contest the propriety of the definition overall; rather, he asserts that there is no rational basis for distinguishing some other kinds of exhibitions, particularly rodeos.[53]

In essence, Haviland's thesis is that Congress recognized a problem of inhumanity to animals but attacked only a part of it. He insists that the requirements imposed by the Act upon producers of animal acts and other performances, but not upon operators of rodeos and other enterprises, is unjustly discriminatory. We note initially that the fact "[t]hat a statute treats different persons contrastingly does not, without more, signify

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also *Richardson* v. *Belcher*, 404 U.S. 78, 92 S.Ct. 254, 30 L.Ed.2d 231 (1971); *Flemming* v. *Nestor*, 363 U.S. 603, 80 S.Ct. 1367, 4 L.Ed.2d 1435 (1960).

[52] See note 17 *supra*.

[53] The bill originally introduced in the House defined "exhibitor" as "any person (public or private) exhibiting animals to the public free or for compensation, including but not limited to zoos and circuses." *Hearings on H.R. 13857 Before the Sub-Comm. on Livestock and Grains of the House Comm. on Agriculture* 103 (1970). The exclusion of rodeos first appeared in the bill reported to the House, H.R. Rep. No. 1651, 91st Cong., 2d Sess. 10 (1970), despite evidence that animals were abused in rodeos. *Hearings on H.R. 13957*, *supra*, at 68-71, 96. Although this change is not explained in the reports or debates, possible reasons do appear. For example, some members of Congress expressed concern about the cost of administering the Act. See, *e.g.*, 116 Cong.Rec. 40155 (1970); *Hearings on H.R. 13957*, *supra*, at 44, 54-55. The practicality of applying the Act to all retail pet stores was doubted, *Hearings on H.R. 13957*, *supra* at 67, and these stores were ultimately excluded. See text *supra* at note 18.

that equal protection is wanting," [54] and that neither "is the showing made by the additional circumstance that in actuality the law does not apply to all to whom it conceivably could." [55] And we give heed to the Supreme Court's teaching that "[a] statute is not invalid under the Constitution because it might have gone farther than it did, or because it may not succeed in bringing about the result that it tends to produce." [56] For "[e]vils in the same field may be of different dimensions and proportions, requiring different remedies"; [57] "reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind." [58] "The legislature" thus, the Court informs, "may select one phase of one field and apply a remedy there, neglecting the others"; [59] in sum, the constitutional

[54] *Washington* v. *United States,* 130 U.S.App.D.C. 374, 382, 401 F.2d 915, 923 (1968). See also *Griffin* v. *County School Bd.*, 377 U.S. 218, 230, 84 S.Ct. 1226, 1232-1233, 12 L.Ed.2d 256, 264-265 (1964).

[55] *Washington* v. *United States, supra* note 54, 130 U.S. App.D.C. at 382, 401 F.2d at 923. See also *United States* v. *Petrillo,* 332 U.S. 1, 8-9, 67 S.Ct. 1538, 1542-1543, 91 L.Ed. 1877, 1883-1884 (1947); *Whitney* v. *California,* 274 U.S. 357, 370, 47 S.Ct. 641, 646, 71 L.Ed. 1095, 1103-1104 (1927).

[56] *Goesaert* v. *Cleary,* 335 U.S. 464, 467, 69 S.Ct. 198, 200, 93 L.Ed. 163, 166 (1948), quoting *Roschen* v. *Ward,* 279 U.S. 337, 339, 49 S.Ct. 336, 73 L.Ed. 722, 728-729 (1929).

[57] *Two Guys from Harrison-Allentown, Inc.* v. *McGinley,* 366 U.S. 582, 591-592, 81 S.Ct. 1135, 1140, 6 L.Ed.2d 551, 558 (1961), quoting *Williamson* v. *Lee Optical Co.,* 348 U.S. 483, 489, 75 S.Ct. 461, 465, 99 L.Ed. 563, 573 (1955).

[58] *Williamson* v. *Lee Optical Co., supra* note 57, 348 U.S. at 489, 75 S.Ct. at 465, 99 L.Ed. at 573.

[59] *Id.* See also *Geduldig* v. *Aiello,* 417 U.S. 484, 494-495, 94 S.Ct. 2485, 2491-2492, 41 L.Ed.2d 256, 263-264 (1974); *Two Guys from Harrison-Allentown, Inc.* v. *McGinley, supra* note 57, 366 U.S. at 591-592, 81 S.Ct. at 1140, 6 L.Ed.2d at 558.

call for equality of treatment "does not require [a choice] between attacking every aspect of a problem or not attacking the problem at all." [60]

Haviland's equal protection contention flies in the face of these established principles. It is constitutionally unimportant that Congress has not seen fit to regulate all interstate transportation, purchasing or selling of animals in one fell swoop. As the evolution of the Animal Welfare Act manifests,[61] Congress has chosen a cautious approach to regulation in this area, increasing governmental intervention as the national interest seemed to warrant. As the House Committee on Agriculture put it, the Animal Welfare Act "represents a continuing commitment by Congress to the ethic of kindness to dumb animals." [62] From the small beginning in 1966—confined to a few animals, and only when they were devoted to research purposes—the present legislation further, though still modestly, "implement[s] a statutory mandate that small helpless creatures deserve the care and protection of a strong and enlightened public." [63] We perceive nothing in the Constitution outlawing this commendable

Cf. South Carolina v. *Katzenbach,* 383 U.S. 301, 330-331, 86 S.Ct. 803, 819-820, 15 L.Ed.2d 769, 787-788 (1966).

[60] *Dandridge* v. *Williams,* 397 U.S. 471, 487, 90 S.Ct. 1153, 1162, 25 L.Ed.2d 491, 503 (1970). See also *Geduldig* v. *Aiello, supra* note 59, 417 U.S. at 494-495, 94 S.Ct. at 2491-2492, 41 L.Ed.2d at 263-264; *Morton* v. *Ruiz,* 415 U.S. 199, 230-231, 94 S.Ct. 1055, 1072, 39 L.Ed.2d 270, 291-292 (1974). And see *Lindsley* v. *Natural Carbonic Gas Co.,* 220 U.S. 61, 31 S.Ct. 337, 55 L.Ed. 369 (1911).

[61] See text *supra* at notes 14-17.

[62] H.R. Rep. No. 91-1651, 91st Cong., 2d Sess. 1 (1970).

[63] *Id.*

"effort to demonstrate America's humanity to lesser creatures." [64]

The judgment appealed from is

Affirmed.

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[64] *Id.* Beyond that, animal acts bear a likeness to carnivals and circuses that sharply diminishes when the comparison is with rodeos and other excluded enterprises. Carnivals and circuses travel about as does Haviland's animal act, and share the problems of traveling animals. Many circuses and some carnivals have dog and pony shows. Carnivals, circuses and animal acts have a measure of sameness in their performances and use of animals. Rodeos do not possess nearly the same degree of similarity to animal acts, and other excluded activities have even less or none at all. Certainly the resemblances between animal acts and rodeos are not so marked as to preclude differences in legislative treatment. See cases cited *supra* notes 51, 54-60.

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In the Supreme Court of the United States

OCTOBER TERM, 1976

HAL HAVILAND, PETITIONER

v.

EARL L. BUTZ, SECRETARY OF AGRICULTURE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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Petitioner owns and operates an itinerant professional animal act which features dogs and ponies (Pet. App. 2a). The act has appeared before paying audiences in various states and on commercial television (*ibid.*; Pet. 4). The Department of Agriculture notified petitioner that he was violating the licensing provisions of Section 7 of the Animal Welfare Act of 1970, 84 Stat. 1561, 7 U.S.C. 2136, by exhibiting animals to the public for compensation without a license and that proceedings to compel compliance might be instituted against him (Pet. App. 2a). After obtaining an exhibitor's license, petitioner instituted this action in the United States District Court for the District of Columbia, seeking a declaratory judgment that he was not subject to regulation under the Act. The district court denied relief, and the court of appeals affirmed (Pet. App.). It held that petitioner was an "exhibitor" required to obtain a license, as that term is defined in 7 U.S.C. 2132(h) (Pet. App. 9a-10),

and that his animal act was subject to federal regulation under the Commerce Clause because of its multi-state travel (Pet. App. 11a-12a). It also held that the Act's regulation of some, but not all, aspects of interstate trafficking in animals did not deny petitioner equal protection (Pet. App. 13a-16a).

1. Petitioner contends (Pet. 5) that the Secretary lacks statutory authorization to regulate his animal act.

The Animal Welfare Act is designed to ensure humane care and treatment of "animals intended for use * * * for exhibition purposes * * * ." H.R. Rep. No. 91-1651, 91st Cong., 2d Sess. 9 (1970). Section 3(h) of the Act, 7 U.S.C. 2132(h), provides that the class of "exhibitors" which must obtain licenses under the Act includes "carnivals, circuses, and zoos exhibiting such animals whether operated for profit or not * * *." The legislative history of this provision shows that it was intended to extend the requirements of the Act to all persons utilizing animals for purposes of exhibition, including road shows. H.R. Rep. No. 91-1651, *supra,* at 2. The Secretary's implementing regulation therefore defines "exhibitor" as including "carnivals, circuses, *animal acts,* and zoos" (emphasis supplied). 9 C.F.R. 1.1(v).

As the court of appeals properly observed, the statutory definition of "exhibitor" was intended to be partial and illustrative, rather than exhaustive (Pet. App. 8a-10a). The Secretary reasonably concluded that traveling animal acts such as petitioner's involved the public exhibition of animals for compensation and thus fell within the statutory definition of an "exhibitor" (see Pet. App. 16a, n. 64), although not specifically so denominated in Section 3(h). His interpretation of this new statute is entitled to substantial deference. See, *e.g., Udall* v. *Tallman,* 380 U.S. 1, 16. The court of appeals therefore correctly held that petitioner's animal show was subject to regulation under the Act (Pet. App. 9a-10a).

2. Petitioner contends (Pet. 7) that the multi-state performances of his animal act are not subject to federal regulation under the Commerce Clause. However, the evidence showed that between August 1, 1972, and August 16, 1973, petitioner's animal show appeared in 13 states on approximately 73 different dates and that it performed on commercial television on three occasions (Pet. App. 2a, nn. 2-3). As the court below correctly held, although each of these discrete performances may have been a local exhibition, the pattern of traveling from state to state to perform, and the utilization of the facilities of interstate commerce to reach audiences, sufficiently affected interstate commerce to subject petitioner's animal act to federal regulation (Pet. App. 10a-12a). See 7 U.S.C. 2132(d); *Flood* v. *Kuhn,* 407 U.S. 258, 282-283.[1]

3. Petitioner also contends (Pet. 8) that the Animal Welfare Act creates an invidious classification that denies equal protection in that it regulates carnivals, circuse animal acts and zoos while excluding from coverage retail pet stores, state and county fairs, livestock shows, rodeos, purebred dog and cat shows, and any other fairs or exhibitions intended to advance agricultural arts and sciences. 7 U.S.C. 2132(h). However, "the Equal Protection Clause does not require that [the government] must

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[1]Similarly, as the court below correctly held (Pet. App. 6a-7a, n. 22), the interstate transportation of these animals for exhibition purposes satisfied the statutory requirement that an exhibitor must exhibit an animal "the intended distribution of which affects commerce, or will affect commerce,* * * " to be subject to the Act. 7 U.S.C. 2132(h). The legislative history of the Act, which demonstrates a clear intent to bring traveling exhibitors under the regulatory framework, supports the court of appeals' determination that the term "distribution" is synonymous with "transportation" in this context. See H.R. Rep. No. 91-1651, *supra,* at 2, 9-10.

choose between attacking every aspect of a problem or not attacking the problem at all." *Dandridge* v. *Williams*, 397 U.S. 471, 486-487. The government may proceed one step at a time, regulating the facets of a problem that appear most urgent and leaving other aspects unresolved. *Jefferson* v. *Hackney*, 406 U.S. 535; *Williamson* v. *Lee Optical Co.*, 348 U.S. 483. As the evolution of the Animal Welfare Act demonstrates, Congress has chosen to extend federal regulation cautiously in this area, due in part to the enormous potential expense of enforcing a more inclusive statute, and the court of appeals properly refused to interpose its judgment as to the appropriate stopping point. See *Geduldig* v. *Aiello*, 417 U.S. 484, 495.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

SEPTEMBER 1976.